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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

Estate of FRED M. FUKUDA, Deceased.

HIROSHI FUKUDA et al.,

Contestants and Respondents,

v.

NANCY TOGUCHI et al.,

Claimants and Appellants.

B224509

(Consolidated with B224512)

(Los Angeles County
Super. Ct. Nos. BP110103 and
BP111036)

APPEAL from judgments of the Superior Court of Los Angeles County,
Michael I. Levanas, Judge. Affirmed.

Snyder, Hancock & Ashworth, Scott A. Hancock; Greines, Martin, Stein &
Richland, Kent L. Richland, Cynthia E. Tobisman and Sheila A. Wirkus for Claimants
and Appellants.

Palmieri, Tyler, Wiener, Wilhelm & Waldron, Don Fisher and Elise Malia Kern
for Contestants and Respondents.

INTRODUCTION

This case consists of a family dispute over the estate of Fred Fukuda. Fred's brothers—Hiroshi Fukuda, James Fukuda and Dick Fukuda—challenge the validity of Fred's will and trust.¹ They contend that Fred's sister Nancy Toguchi and her husband Bob Toguchi exercised undue influence over Fred. After a referee held a bench trial and issued a statement of decision, the trial court declared the will and trust void and entered judgments in favor of the brothers and against Nancy and Bob. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Fukuda Family and Their Real Property*

Fred was born in California in 1918. He was the eldest son of Yaoki Fukuda and Sueno (Murata) Fukuda, both of whom were born in Japan.

Fred had nine siblings. The four siblings who survived Fred are parties in this action. Hiroshi, James, Dick and Nancy were 10, 13, 17 and 20 years younger, respectively, than Fred.

Fred's parents were farmers. In 1948, Fred's father Yaoki Fukuda and Suyematsu Murata purchased farm land in Stanton (Stanton property). Suyematsu Murata and his family were related to Fred's mother Sueno. Because the former California Alien Land Law prohibited the purchase of the property by Yaoki and Suyematsu, the title of the property was placed in the name of their two eldest children, Fred Fukuda and Mary Murata.² Fred owned 40 percent of the Stanton property, while Mary owned 60 percent. Fred's only employment during the course of his long life was working on the family farm.

¹ We sometimes refer to individuals in this case by their first name for the sake of clarity and not out of disrespect to them.

² According to Hiroshi, it was Japanese custom that property was given to the eldest son, who was then obligated to distribute it fairly to his brothers.

2. *Previous Litigation Among Family Members*

Before the current action, Fred was a party to two lawsuits involving his family. The first concerned a dispute over the Stanton property. In 1977, Hiroshi, James, Dick, Nancy, Sueno, and Fred's brother Masanobu Fukuda³ filed a lawsuit against Fred and members of the Murata family. The plaintiffs alleged, inter alia, that Fred Fukuda and Mary Murata held the Stanton property in trust for members of their respective families, and that Fred and Mary had wrongfully transferred 17.5 percent of the property to the Muratas.⁴ The parties entered into a settlement agreement in 1982 whereby defendants paid plaintiffs \$400,000. Subsequently, the Stanton property was sold for over \$15 million.

In the second action (the Gilbert Street action), Nancy and Fred filed a complaint against Hiroshi and his son John Fukuda seeking a partition of real property located on Gilbert Street in Garden Grove (Gilbert Street property) as well as damages.⁵ Fred agreed to join Nancy as a plaintiff in this action, though he was initially very reluctant to do so. After the suit was commenced, Fred stated to Nancy that he was unhappy being involved in the litigation because he did not want to jeopardize his relationship with his

³ Masanobu died in 1985. Fred's father Yaoki and mother Sueno passed away in 1968 and 1981, respectively.

⁴ In February 1977, Fred Fukuda and Mary Murata executed a quitclaim deed conveying the Stanton property to Paul Murata (22.5 percent), Robert Murata (22.5 percent), Mary Murata (22.5 percent), Fred Fukuda (22.5%), and George Murata (10 percent). This gave the Murata family a 77.5 percent interest in the Stanton property.

⁵ From 1993 to 2003, John repeatedly expressed an interest in buying the Gilbert Street property. At the time, Fred had a 50 percent interest in the property, and Hiroshi, James, Dick and Nancy each had a 12.5 percent interest. The property had been vacant since 1985. Fred, Hiroshi, James and Dick repeatedly agreed in principle to sell their interests to John, but Nancy did not. Finally, in July 2003, Fred executed a quitclaim deed conveying his interest in the Gilbert Street property to John. In the complaint in the Gilbert Street action, Nancy alleged that in July 2003, "Fred Fukuda was unduly susceptible to being taken advantage of by reason of his advanced years[.]"

brothers. At a family gathering on January 1, 2005, Fred denied any knowledge of the lawsuit to his brothers Hiroshi, James and Dick. In November 2005, the Gilbert Street action was settled.

3. *Fred's Mental Capacity and Relationship with His Family While Living as a Widower in His Little Tokyo Condominium*

After Fred's wife died in January 2003, Fred lived alone in his condominium in the Little Tokyo district of Los Angeles (Little Tokyo Condo). Fred's good friend Henry Higashida lived nearby and saw Fred almost every day. According to Henry, Fred sometimes fell asleep in the middle of conversations. Fred also had an incontinence problem and was not able to walk on his own.

Henry also testified that Fred told him "all the time" that he wanted to give his money to his brothers upon his death. Fred never told Henry that he had any desire to leave money to his nieces, his brother-in-law Bob, or Keiro Nursing Home (Keiro), all of whom became beneficiaries of his estate.⁶

In 2004, Hiroshi's son John assisted Fred with estate planning. John introduced Fred to attorney Timothy Wong. Following Fred's instructions, Wong prepared a living trust and pour-over will which divided Fred's estate equally among his four surviving siblings. Fred, however, did not sign any testamentary documents at that time.

In light of the age difference between Fred and his siblings, Fred had never been particularly close to Hiroshi, James, Dick and Nancy.⁷ Nonetheless, he saw each of them periodically, usually at family functions. After Fred's wife died, he began seeing his surviving siblings more often. Hiroshi and his wife visited Fred about once a month, usually at Henry's home. During these visits, Fred talked very little and always fell

⁶ Fred's four nieces—Miki Aeling, Patti Bowditch, Joyce Warner and Nancy Cochran—were the children of Fred's deceased sister. Henry testified that Fred did not know his nieces.

⁷ According to Hiroshi, Fred did not attend Nancy's wedding because he did not approve her marriage to Bob Toguchi.

asleep. Dick also periodically visited Fred at Henry's home. Dick testified that Fred was not very talkative during these visits and often fell asleep. James, too, occasionally saw Fred.

In 2004, Henry asked Nancy to clean Fred's apartment. Along with her husband Bob, Nancy did so. According to Nancy, in September 2004, she and Bob began regularly cleaning Fred's apartment and visited Fred once or twice a week.

While Fred lived at the Little Tokyo Condo, he took care of his own finances. Although Fred suffered from physical ailments, such as severe degenerative arthritis, there is nothing in the records of Fred's internist, Dr. Takeshi Matsumoto, which indicates Fred had cognitive impairment while living at the Little Tokyo Condo.

4. *Fred is Hospitalized and Transferred to Keiro Nursing Home*

In October 2006, Fred fell, hit his head and was taken to Los Angeles County/USC Medical Center (County USC). Nancy and James visited Fred at the hospital. Hiroshi and Dick did not do so because they were not informed Fred was taken there.

The reports from County USC indicate that Fred was diagnosed with "delirium" and "dementia." A County USC physician also noted that Fred had a "good relationship with his sister but suspects that his sister may wish to get his property/money after he dies."

On November 2, 2006, Fred was taken from County USC to Keiro. Initially, Fred was unhappy living at Keiro and wanted to go home. Nancy assisted Fred by looking for professionals to provide 24-hour care for Fred at his Little Tokyo Condo. Fred's unhappiness with his predicament at Keiro, however, gradually dissipated. He never returned home.

At Keiro, Fred could no longer walk. He was given assistance getting around and with dressing, eating, personal hygiene and going to the bathroom. According to three caretakers employed by Keiro—Chisui Yamasaki, Hiroko Koga and Jennifer Beltran—Fred was alert, responded to questions appropriately, and capable of making his wishes known, though he had episodes of forgetfulness.^{ten} Dr. David Trader, an expert retained by Hiroshi, James and Dick, testified that while at Keiro, including in January

2007, Fred was “very susceptible” to undue influence because of his mental impairment and physical dependence on others. Dr. Trader further testified that Fred lacked testamentary capacity to execute documents in January 2007. Dr. Stephen Read, Nancy’s expert, testified that in January 2007 Fred was “somewhat susceptible” to undue influence and that he had testamentary capacity.

While Fred was living at Keiro, his four siblings and Henry visited him. Henry visited Fred every week. Hiroshi visited Fred once a month. James saw Fred at Keiro about six to ten times. Dick made about three visits. According to social worker Chisui Yamasaki, Nancy visited Fred “often.” Henry and Fred’s brothers testified that Fred hardly talked during their visits and often fell asleep while they were there.

5. *January 19, 2007 Meeting*

On January 19, 2007, Fred, Nancy, Bob, and Henry met attorney James Mitsumori at a conference room in Keiro for a meeting to discuss Fred’s estate plan. This was the first of three meetings Mitsumori had with Fred. Mitsumori never met Fred alone. At each meeting, Nancy and Bob were there.

Nancy had called Mitsumori to arrange for the first meeting. At the time, Mitsumori did not know that Fred had been diagnosed with dementia by County USC, and Nancy did not inform him of this diagnosis. Mitsumori sent his bills for legal services to Nancy.

Henry, who is blind, testified he heard the following. Nancy said to Fred, “How much do you want to give to your nieces?” After Fred did not respond, Nancy said, “How much do you want to give them? \$20,000 each?” Again, Fred did not respond. Nancy also asked Fred, “How much do you give to your brothers?” Fred did not respond to this question. Bob then said, “No, no, no, don’t give those stingy guys [i.e. Fred’s brothers] no money.”

Additionally, Henry heard Nancy ask Fred, “Do you want to donate to Keiro Nursing Home?” Mitsumori stated that he would like to see a donation to Keiro because residents at Keiro often did not pay for the full cost of providing them services. Mitsumori was one of the founders of Keiro and served on its board of directors.

According to Henry, Fred said nothing during the meeting, which lasted about 30 minutes.

6. *January 31, 2007, Meeting and the Execution of the Trust, Will and Other Documents*

a. *The Meeting*

On January 31, 2007, Fred, Nancy, Bob and Mitsumori held a meeting at Keiro regarding documents Mitsumori had drafted. Fred did not ask any questions at the meeting.

b. *Fred's Trust*

At the meeting, Fred executed a Declaration of Trust (Declaration) creating the Fred M. Fukuda Trust (Trust). Pursuant to the Declaration, Nancy was appointed the trustee, Bob was appointed the successor trustee, and Nancy's and Bob's son Byron Toguchi was appointed the second successor trustee. The Declaration also transferred the Little Tokyo Condo and Fred's interest in two bank accounts to Nancy, as trustee of the Trust. The Declaration further provided that upon Fred's death his four nieces would be given \$20,000 each, and that the remainder of the trust estate would be distributed as follows: 65 percent to Nancy, 10 percent to Bob⁸ and 25 percent to Keiro.

c. *Fred's Will*

Fred also executed his last will and testament (Will). Fred's signature was witnessed by Keiro social worker Chisui Yamasaki and Mitsumori. Yamasaki testified that Fred appeared "alert" and seemed to "understand what was going on with respect to his signing of the will."

⁸ According to Mitsumori, Fred initially wanted to give 10 percent of the residual trust estate to Henry. Subsequently, however, that portion was allocated to Bob in order to prevent Henry from losing the government benefits he was receiving.

The Will appointed Nancy as executor and Bob as successor executor. It further provided that upon Fred's death, all of Fred's tangible personal property was bequeathed to Nancy and, if Nancy did not survive Fred, to Bob. The remainder of Fred's estate was bequeathed to the trustee of the Trust.

d. *Other Documents*

Fred executed three additional documents at the January 31, 2007, meeting. The first was a grant deed conveying the Little Tokyo Condo to Nancy, as trustee of the Trust. The second was an advance health care directive, which among other things granted Nancy the power to make health care decisions for Fred. Finally, Fred executed a power of attorney granting Nancy sweeping general powers to conduct financial transactions for Fred.⁹

With her new authority Nancy began paying Fred's bills by writing checks for him. Nancy also used Fred's money to reimburse herself and Bob for expenses they allegedly incurred on Fred's behalf. For example, on February 2, 2007, Nancy withdrew \$50,000 from an account Fred had at Union Bank.¹⁰ At her deposition and at trial, Nancy could not explain why that amount was withdrawn.

⁹ Nancy also obtained powers of attorney in connection with Fred's accounts at two banks. On November 13, 2006—less than two weeks after Fred was transferred to Keiro—Nancy went to California Bank and Trust (Cal B & T) and obtained a power of attorney to manage Fred's accounts there. Then, on November 17, 2006, Fred executed a document granting Nancy the power of attorney to manage Fred's accounts at Union Bank of California (Union Bank). Additionally, on February 8, 2007, a representative of Union Bank met Fred at Keiro so that he could sign a "living trust document." The meeting was arranged by Nancy.

¹⁰ Even before Nancy obtained a general power of attorney, she used her Cal B & T power of attorney to reimburse herself and Bob for alleged expenses. For example, on December 5, 2006, Nancy wrote a check in the amount of \$1,500 to Bob drawn from one of Fred's Cal B & T accounts. The payment was allegedly for expenses associated with repairs to Bob's vehicle, gas expenses Bob incurred, and reimbursement for restaurant bills Nancy and Bob incurred while eating with Fred. Nancy and Bob, however, did not keep track of their expenses, and had no receipts to prove them.

7. *Henry's Testimony Regarding Fred's Mental Competence While Living at Keiro*

At trial, the referee asked Henry about Fred's mental state at Keiro. Henry testified that Fred "didn't say hardly anything" while he was there. He also testified that after Nancy saw Fred, Fred indicated he signed something. Henry further testified: "I [Henry] said, 'What did you sign, Fred?' He [Fred] said, 'I don't know.'"

8. *Hiroshi, James and Dick Request to See the Trust and Will Documents*

In February 2007, James, Hiroshi and Dick had a meeting to discuss whether Fred had created an estate plan. They decided that if such a plan existed, they wanted to get copies of the relevant documents. Subsequently, Mitsumori's secretary called Nancy and informed her that Hiroshi, James and Dick wanted to see a copy of the Will and Declaration. According to Nancy, Fred refused to provide a copy of these documents to his brothers.

9. *July 24, 2007, Meeting and Execution of Amendment to Trust and Grant Deed Conveying Little Tokyo Condo to Nancy*

a. *The Meeting*

On July 24, 2007, Fred, Nancy, Bob and Mitsumori met at Keiro to discuss certain changes to Fred's estate plan and other matters. Fred did not ask any questions at the meeting. Mitsumori still did not know that Fred had been diagnosed with dementia by County USC.

b. *First Amendment to Declaration of Trust*

At the meeting, Fred executed a First Amendment to Declaration of Trust. This document provided that if Nancy, Bob or Byron did not or could not serve as trustee, a successor trustee could not be appointed without approval of (1) Fred (if living and able to sign), (2) Nancy (if living and able to sign), and (3) Mitsumori or his law partner David La Salle.

c. *Transfer of Little Tokyo Condo to Nancy*

At the meeting, Nancy, as trustee of the Trust, executed a grant deed conveying the Little Tokyo Condo to Nancy, as an individual.¹¹ Additionally, Nancy and Fred signed an agreement which obligated Fred to indemnify, defend and hold Nancy harmless “from and against any and all claims, demands, damages or other liabilities (including attorney’s fees and costs) arising from the transfer of [the Little Tokyo Condo] to her.” Mitsumori notarized both the deed and the agreement.

10. *The Pay on Death Accounts and Life Insurance*

Fred had numerous “pay on death” (POD) bank accounts and several life insurance policies that named one or more of his siblings as beneficiaries. These assets were not part of the trust estate.

The record does not always clearly indicate when or under what circumstances Nancy was made the exclusive beneficiary of some POD accounts. It appears that Nancy assumed that position while Fred was at Keiro.

We can trace in detail the changes made to at least one POD account, account number 1021115710 at Union Bank (Account 710). In 2003, Fred executed a document making Account 710 payable on death to Hiroshi, James, Dick and Nancy. On May 10, 2006, Fred signed a superseding document which again named the same four beneficiaries. Then, in January 2007—while Fred was at Keiro—Nancy obtained a form from Union Bank to change Account 710 to a joint tenancy between Fred and Nancy. She took this document to Fred at Keiro, where she and Fred signed it on January 17, 2007. Nancy claims that this change was necessary because “Fred was having difficulty signing his checks.” But this explanation makes no sense because Nancy already had a power of attorney to sign checks on Fred’s behalf for his Union Bank accounts.

¹¹ After the Little Tokyo Condo was conveyed to Nancy, individually, she continued to use Trust funds to pay the utilities for the property.

11. *Fred's Death and the Distribution of the Estate*

On March 4, 2008, Fred died. His death certificate listed senile dementia as a condition contributing to his death.

At the time of his death, Fred's assets amounted to \$3,727,726.¹² Although Hiroshi, James and Dick were not beneficiaries of the Will or Trust, they nonetheless received \$281,441 each from POD accounts and life insurance proceeds. The brothers thus each inherited about 7.5 percent of Fred's estate.

Nancy received the lion's share of the estate and substantially more than her brothers. As beneficiaries of the Trust, Bob, Keiro and Fred's nieces will also receive distributions if the Trust is held valid.

12. *Nancy's Payments to Herself and Bob for Alleged Trustee Services and Reimbursement of Expenses*

Before and after Fred's death, Nancy made very substantial payments to herself and her husband Bob from Fred's various bank accounts. At trial Nancy explained generally that she paid herself for trustee's fees, and that she did not realize that she could recover such fees until after Fred died. She also claimed that she reimbursed herself and Bob for various expenses. Nancy, however, admitted that she did not keep track of expenses and often could not provide specific explanations for the payments.

For example, on February 14, 2008, Nancy wrote a check drawn from one of Fred's Union Bank accounts to Bob for \$5,000. Nancy stated at her deposition, which was read at trial, that she could not "remember" why she wrote this check. Bob testified at his deposition that the payment was for repairs to his vehicle, as well as for parking citations, associated towing expenses, and Bob's services for cleaning the Little Tokyo Condo. This testimony was read at trial.

¹² We base many of the facts regarding the distribution of Fred's estate on the calculations of Stephen Zamucen, an expert accountant retained by Hiroshi, James and Dick. The calculations of Nancy's expert accountant, Kenneth Creal, were somewhat different.

There are many more examples of payments and withdrawals that Nancy could not explain. These payments and withdrawals added up to hundreds of thousands of dollars.

13. *The Commencement of Two Actions in the Superior Court*

On April 10, 2008, Nancy filed a petition to probate the Will and for letters testamentary (the Will Action). Hiroshi, James and Dick filed a contest to the Will. The brothers challenged the Will on two grounds: (a) Fred was not of sound and disposing mind when he executed the Will; and (b) Fred executed the Will as a result of the undue influence of Nancy and Bob.

On June 6, 2008, Hiroshi, James and Dick filed a petition to determine the validity of the Trust and to impose a constructive trust against Nancy, Bob and Keiro (the Trust Action). The brothers challenged validity of the Trust on the grounds that (a) Fred did not have sufficient mental capacity to understand the nature of his actions when he executed the Declaration and (b) Nancy, Bob and Keiro exercised undue influence over Fred. Nancy filed an answer to this petition. Bob and Keiro did not file responsive pleadings.

14. *The Trial*

In response to stipulations by the parties, the trial court ordered the appointment of Judge Aviva Bobb (Ret.) to serve as a referee in both the Will Action and the Trust Action pursuant to Code of Civil Procedure section 638. Both cases were tried together during an eight day trial in October and November 2009.

15. *Statement of Decision*

On February 23, 2010, the referee issued a 13-page statement of decision regarding the Will Action and the Trust Action. With respect to Fred's testamentary capacity, the statement of decision provided: "While evidence of dementia symptoms were proven, there was insufficient evidence shown that in the first half of 2007 the Decedent lacked the knowledge and understanding required to prove any of the three elements of Probate Code 6100.5 for a finding of lack of testamentary capacity."

With respect to undue influence, the decision stated that the presumption of undue influence is created if the challenger shows that “ ‘(1) the person alleged to have extended undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument’s preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.’ ” The decision further stated that Hiroshi, James and Dick proved all three prongs, thus creating a presumption of undue influence. It also stated that because Nancy did not meet her burden of proving a lack of undue influence, the Will and Trust are declared void, and the assets “titled or held” in the name of the Trust are declared the assets of Fred’s estate. Additionally, the decision stated Bob and Keiro, having been duly served with the petition in the Trust Action and having failed to respond thereto, were bound by the decision.

The statement of decision also noted that Nancy’s “credibility is lacking because her trial and deposition testimony was replete with inconsistencies and failures of memory. During her testimony she could not explain many of the transactions she engaged in.”

In the decision, the referee also expressed concern over Nancy’s “aggressiveness to transfer the Decedent’s assets to herself.” The decision gave numerous examples of such activity. It also noted that “[i]n June and August 2007, [Nancy] participated in making herself the pay on death beneficiary on numerous of the Decedent’s bank accounts, thereby depriving other beneficiaries or her siblings of these assets. In other transactions she appeared to use the trust to pay personal expenses.”

16. *The Judgment and Appeal*

On April 5, 2010, the trial court adopted the statement of decision and issued judgments in both the Will Action and the Trust Action accordingly. In the judgment in the Trust Action, the court declared the Trust and all purported amendments thereto void, and also declared the assets “currently or formerly titled” in the name of the Trust were the assets of the estate of Fred Fukuda. In the judgment in the Will Action, the court denied the petition to probate the Will and declared the Will void.

Nancy timely appealed the judgment in the Will Action and Nancy and Bob timely appealed the judgment in the Trust Action.

CONTENTIONS

Nancy and Bob argue that the judgments must be reversed because there was no substantial evidence supporting the trial court's finding that a presumption of undue influence arose. Alternatively, Nancy contends the portion of the judgment in the Trust Action imposing a constructive trust on the Little Tokyo Condo should be reversed because it does not conform to the statement of decision.

DISCUSSION

1. *There is Substantial Evidence to Support the Trial Court's Finding of Undue Influence*

a. *Standard of Review*

Nancy and Bob concede that the trial court's finding of undue influence must be reviewed under the substantial evidence test. In determining whether substantial evidence supports a trier of fact's finding, we are bound by the trial court's credibility determinations (*Estate of Young* (2008) 160 Cal.App.4th 62, 76) and we must make all reasonable inferences in favor of the finding; we do not reweigh the evidence. (*Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 292.) If we conclude such substantial evidence exists, it is of no consequence that the fact finder, believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion. (*Ibid.*; *Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143.)

b. *There Was Substantial Evidence Supporting a Presumption of Undue Influence*

A will or a trust may be set aside as void if it is procured by undue influence. (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684; Prob. Code, § 6104.) "Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency." (*Rice v. Clark* (2002) 28 Cal.4th 89, 96 (*Rice*)). Undue influence consists

of, inter alia, “taking an unfair advantage of another’s weakness of mind[.]” (Civ. Code, § 1575.)

Although a person challenging a testamentary instrument ordinarily bears the burden of proving undue influence (Probate Code, § 8252), a rebuttable presumption of undue influence arises “upon the challenger’s showing that (1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument’s preparation or execution; and (3) the person would benefit unduly by the testamentary instrument.” (*Rice, supra*, 28 Cal.4th at p. 97.)

Here, as we shall explain, there is substantial evidence that all three prongs of this test were satisfied. The burden thus shifted to Nancy and Bob to show that the Will and Trust were not procured through their undue influence.

(i) *Confidential Relationship*

Nancy and Bob concede that they had a confidential relationship with Fred.

(ii) *Active Participation*

Active participation in procuring or executing a written instrument can be shown by circumstantial evidence.¹³ (*Estate of Baker* (1982) 131 Cal.App.3d 471, 481 (*Baker*).) In determining whether undue influence was exerted, the trier of fact can consider facts relating to the actual time the instrument was executed, as well as “facts bearing upon undue influence both before and after execution so long as they tend to show such influence when the will was executed.” (*Ibid.*)

¹³ Nancy and Bob contend that “active participation” requires evidence of “noxious” activity by the beneficiary of a will or trust. The term “noxious” was used one time in *Estate of Goetz* (1967) 253 Cal.App.2d 107, 117 (*Goetz*) and one time in *Estate of Niquette* (1968) 264 Cal.App.2d 976, 984 (*Niquette*). *Goetz* did not cite any authority for use of this term, and *Niquette* only cited *Goetz*. (*Goetz*, at p. 117; *Niquette* at p. 984.) Nancy and Bob do not cite any other cases which use this term and we have found none. We decline to adopt the statement in *Goetz* and *Niquette* that the element of “active participation” requires “noxious” activity by the beneficiary of a will or trust.

In *Baker*, for example, there was no direct evidence that the proponent of a will, Alta, exerted undue influence on the testatrix, Dorothy, when the will was actually executed. Alta was not even present at the time. (*Baker, supra*, 131 Cal.App.3d at pp. 479, 483.) Nonetheless, the court held there was circumstantial evidence showing Alta actively participated in procuring the will. The court considered, inter alia, evidence that Alta persuaded Dorothy to transfer property to her by claiming she was receiving messages from Dorothy's deceased relatives requesting her to do so. "From this evidence," the court concluded, "the jury reasonably could infer that Alta procured the will through the same means (acting as a medium with messages from the dead) whereby she obtained from Dorothy gifts of money and interests in the stocks and condominium." (*Id.* at p. 482.)

In determining whether a person actively participated in procuring a will or trust, we must consider whether the person had an opportunity to control the testamentary act. One of the "indicia" of undue influence is the existence of such an opportunity (*Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585 (*Lingenfelter*); *Estate of Rutherford* (1957) 153 Cal.App.2d 365, 368 (*Rutherford*)), though mere opportunity is not of course sufficient to show active participation. (*Estate of Mann* (1986) 184 Cal.App.3d 593, 607 (*Mann*).)

Another indicium of undue influence is that "the decedent's mental and physical condition was such as to permit a subversion of his freedom of will[.]" (*Lingenfelter, supra*, 38 Cal.2d at p. 585; accord *Rutherford, supra*, 153 Cal.App.2d at p. 368.) A vulnerable decedent can be unduly influenced by conduct that would not unduly influence a decedent who is mentally and physically solid.

Turning to the facts of this case, expert testimony established that Fred was "very susceptible" to undue influence at the time he executed the documents creating the Will and Trust. Fred was suffering from dementia, and he was often forgetful and prone to fall asleep in the presence of others. He was also unable to physically care for himself and did not have the mental and physical capacity to manage his own financial affairs. At the critical January 19, 2007, meeting when virtually all of the instructions for the Will and

Trust were given to attorney Mitsumori, and during the January 31, 2007, meeting, when Fred executed the Will and Declaration, Fred did not ask any questions and said little or nothing.

Nancy and Bob were present at each meeting with Mitsumori and Nancy had already assumed handling Fred's financial affairs by the time Fred created the Will and Trust. Nancy and Bob thus certainly had an opportunity to unduly influence Fred.

Moreover, Nancy arranged for Fred and Mitsumori to meet at Keiro and paid Mitsumori's bills.¹⁴ She and Bob also participated in the meeting where Mitsumori gathered information to draft the Will and Declaration. Nancy asked Fred questions about his intentions and even suggested that he leave \$20,000 to each of his nieces. She also suggested Fred leave part of his estate to Keiro. This idea was encouraged by attorney Mitsumori. Bob, too, suggested that Fred leave nothing to his "stingy" brothers. Although Fred did not speak at the meeting, all three suggestions were incorporated into the Will and Trust. In light of Fred's silence during his meetings with Mitsumori, Fred's dementia, and Fred's subsequent statement to Henry that he did not know what he signed, a reasonable trier of fact could have concluded that Nancy and Bob manipulated Fred, and actively participated in the procurement of the Will and Trust.

Additionally, evidence of Nancy's conduct as a trustee of the Trust and a holder of powers of attorney supports a finding of active participation. There was extensive evidence from which the trial court could reasonably conclude that Nancy engaged in a pattern and practice of misappropriating Fred's assets. From this evidence the court could have reasonably inferred that Nancy had the same motive and engaged in similar nefarious activity during the January 19 and 31, 2007, meetings. (*Baker, supra*, 131 Cal.App.3d at p. 482.)

¹⁴ Nancy and Bob correctly note that procuring an attorney to prepare a will and trust does not by itself constitute "active participation." (*Mann, supra*, 184 Cal.App.3d at p. 608.) Such conduct, however, can be considered as a factor in determining whether a party actively participated in procuring a testamentary instrument. (*Rutherford, supra*, 153 Cal.App.2d at p. 372.)

In *Rutherford*, the court found there was substantial evidence that Maie was active in procuring Stella's will. In support of this finding, the court stated: "She [Maie] discussed the matter with Stella on several occasions; she went with her to the attorney's office where the will was prepared; arranged for the attorney to bring the will to her home; asked the subscribing witnesses to witness the will; and would not permit Stella to go to her home in Texas after her son's death." (*Rutherford, supra*, 153 Cal.App.2d at p. 372.)

Nancy and Bob did at least as much here. Indeed, the evidence of active participation is stronger in this case because there was no evidence in *Rutherford* that Maie made specific suggestions regarding Stella's will at a meeting where the contents of the will was decided. Further, unlike the testatrix in *Rutherford*, Fred said little or nothing during his meetings with the attorney who drafted the relevant documents, while both Nancy and Bob spoke. This, too, indicates that the documents were drafted at Nancy's and Bob's direction. (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 866 (*Gelonese*) [one of the witnesses stated: "' . . . it was kind of a funny set up. . . . The old lady was making out the will and the other two [Robert and Lena] were doing all the talking.' "].)

When viewed in context and cumulatively, there was substantial evidence that Nancy and Bob actively participated in the procurement of the Will and Trust.

(iii) *Undue Benefit*

An "undue" benefit from a will or a trust occurs when the disposition of the estate is "unnatural." (*Gelonese, supra*, 36 Cal.App.3d at p. 866; *Rutherford, supra*, 153 Cal.App.2d at p. 368.) Whether individuals "unduly" benefit from a testamentary instrument entails a "qualitative assessment" of the relationship between testator and the beneficiaries. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 607.) This assessment includes a review of the testator's past statements about the beneficiaries, including statements about the disposition of his or her estate. (Cf. *Gelonese*, at p. 866 [undue benefit was shown by, inter alia, decedent's statements that she wanted to treat all of her children equally].) An indicium of undue influence is that the will is at variance with the

testator's previous statements. (*Lingenfelter, supra*, 38 Cal.2d at p. 585; *Rutherford*, at p. 368.)

Here, Fred indicated numerous times that he wanted to leave at least as much of his estate to each of his brothers as he left to Nancy. To Henry, he repeatedly stated he wanted to divide his estate between his brothers and did not mention Nancy or Bob. To attorney Wong, Fred indicated that he wanted to divide his estate equally among his four siblings. This same equal division was reflected in Fred's written instructions regarding most of his POD accounts before Nancy took the initiative to have Fred change those instructions while he was at Keiro.

There is no evidence that before January 2007 Fred wanted to leave any part of his estate to Bob or that he was particularly close to his brother-in-law. In fact, Fred did not attend Nancy's wedding because he disapproved her marriage to Bob. Yet Bob was a beneficiary of the trust estate while his brothers were not. This seems particularly surprising because there is evidence that Fred maintained a positive relationship with his brothers while he was living at the Little Tokyo Condo and as a resident of Keiro.

Likewise, Fred did not previously indicate a desire to leave any part of his estate to Keiro. Although Fred eventually seemed content at Keiro, at first he was unhappy being there. In January 2007, Fred had only been at Keiro for about two months. Yet he allegedly decided to leave 25 percent of his residual trust estate to Keiro while completely omitting his brothers from his Will and Trust.

Nancy and Bob argue that they did not unduly benefit from the Will and Trust because at the end of Fred's life they spent more time with him, and provided more care for him, than his brothers did. The bulk of the evidence to support this assertion consisted of Nancy's testimony. The referee, however, found that Nancy was not a credible witness. Accordingly, as Nancy and Bob concede, "[t]he effect of the trial court rejecting Nancy's testimony is that it drops out of the case as if she had never testified."

Moreover, Nancy and Bob generously compensated themselves for the services they provided Fred. Thus there was no reason for Fred to leave the vast majority of his estate to Nancy and Bob while leaving relatively little to his brothers.

It is also noteworthy that a physician at County USC stated in his notes that Fred “suspects that his sister may wish to get his property/money after he dies.” Fred made this statement to a neutral medical professional about two months before he purportedly agreed to leave the bulk of his estate to Nancy. This undercuts Nancy’s argument that Fred wanted her to receive the lion’s share of his estate because there would be no reason for Fred to “suspect” Nancy of scheming to obtain his assets if he indeed planned on leaving most of them to her.

Finally, in determining whether Nancy and Bob unduly benefited from the Will and Trust, it is worth noting the source of Fred’s wealth and the cultural traditions of his family. A reasonable inference can be made that most of Fred’s estate can be traced to the proceeds of the sale of the family farm in the 1980s. Fred, as the eldest brother, had been placed on the title to the property not because of any consideration he provided, but in order to circumvent a law prohibiting his parents’ ownership of real estate. According to Hiroshi, it was Japanese custom for the eldest brother to inherit his parents’ property and then to distribute it to his brothers. While this custom cannot by itself determine whether Nancy and Bob unduly benefitted from the Will and Trust, we cannot entirely discount this evidence in determining whether Fred’s alleged estate plan was “unnatural.”

We conclude there was substantial evidence that Nancy and Bob unduly benefited from the Will and Trust. Thus all three prongs necessary to establish the rebuttable presumption of undue influence are satisfied. Contrary to appellants’ contention, the trial court correctly shifted the burden of proof to Nancy and Bob to show that they did not unduly influence Fred. On appeal, Nancy and Bob do not argue, and have not shown, that they met their burden.

2. *Nancy Forfeited Her Argument That the Judgment in the Trust Action Does Not Conform to the Statement of Decision*

Code of Civil Procedure section 664 provides that a judgment following a bench trial should be “in conformity to the decision of the court[.]”¹⁵ Nancy contends that the judgment in the Trust action is not in conformity to the statement of decision.

The statement of decision imposed a constructive trust on the assets “titled or held” in the name of the Trust. The Little Tokyo Condo, however, was not titled or held in the name of Trust because Nancy, as trustee, transferred the property to herself without consideration before Fred died. Thus Nancy contends the statement of decision did *not* impose a constructive trust on the Little Tokyo Condo.

The judgment in the Trust Action provides for a constructive trust on assets “currently or formerly titled” in the name of Trust, which includes the Little Tokyo Condo. Nancy argues the judgment should be reversed to conform to the statement of decision, i.e. the judgment should limit the constructive trust to assets “titled or held” in the name of the Trust.

Nancy, however, did not make this argument in the trial court or raise any objection to the judgment. She thus forfeited the argument on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re Marriage of Fossum* (2011) 192 Cal.App.4th 336, 346.)

Nancy correctly notes that we may nonetheless consider the argument because it involves an issue of law. “But the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue.” (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) In considering whether to excuse Nancy’s forfeiture we are mindful that the purpose of the forfeiture rule “is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected.” (*Ibid.*)

¹⁵ Where, as here, a referee is appointed by consent pursuant to Code of Civil Procedure section 638, the decision of the referee “must stand as the decision of the court, and upon filing of the statement of decision with the clerk of the court, judgment may be entered thereon in the same manner as if the action had been tried by the court.” (Code Civ. Proc., 644, subd. (a).)

This is not one of those rare cases where a party's forfeiture should be excused. On February 23, 2010, the referee issued her statement of decision and served it on the parties. Hiroshi, James and Dick served Nancy with a proposed judgment on March 12, 2010. Under California Rules of Court, rule 3.1590(j), Nancy had 10 days to object to the proposed judgment. After Nancy made no such objection, the court entered the judgment as proposed on April 5, 2010.

Had Nancy made an objection in the trial court, the court would have had an opportunity to correct or at least address the apparent discrepancy between the referee's statement of decision and the judgment at a time when the referee had recently issued its decision. It is now more than two years later. In light of the purpose of the forfeiture rule, we decline to excuse Nancy's failure to make a timely objection to the proposed judgment in the Trust Action.

DISPOSITION

The judgments dated April 5, 2010, are affirmed. Hiroshi Fukuda, James Fukuda and Dick Fukuda are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.